

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 17979
[REDACTED],)	
)	DECISION
Petitioner.)	
)	

On February 27, 2004, the Sales and Use Tax Audit Bureau of the Idaho State Commission issued a Notice of Deficiency Determination to [Redacted]. (taxpayer) asserting additional sales tax in the amount of \$82,009 and interest in the amount of \$11,006 totaling \$93,015 for the period of April 1, 2000 through March 31, 2003.

The taxpayer protested the deficiency on March 30, 2004. The taxpayer requested an informal hearing, which was held on July 29, 2004.

The taxpayer is in the business of selling various gases used for industrial and commercial purposes and in selling medical oxygen and other medical equipment and supplies. The taxpayer raised two objections to the audit findings: the imposition of sales tax on bulk carbon dioxide cylinder rentals and the imposition of sales tax on “hazmat fees.”

First, the bulk carbon dioxide cylinders, which the taxpayer and the manufacturer of the cylinders call “Carbomizers.” The taxpayer sells carbon dioxide, which is usually contained in a returnable cylinder, to restaurants. The carbon dioxide is mixed with syrup and water, the components of soda fountain beverages. The taxpayer, in the ordinary course of business, makes regular deliveries to restaurants, drops off full cylinders and retrieves empty ones. If a restaurant is selling a large amount of soda fountain beverages, it is more convenient to install a Carbomizer. Carbomizers are left in place in the restaurant. The taxpayer will periodically make calls on restaurants renting carbomizers and fill them with carbon dioxide. Carbomizers can be recharged from outside the building so there is little disruption of the restaurant’s business operations. The

taxpayer charges a fixed monthly rent on the carbomizers. The rent is charged separately from the charge for the carbon dioxide.

Idaho Code § 63-3612 defines the term “sale” for the purposes of the Idaho Sales Tax Act. Transactions that fall within this definition are taxable when sold to a consumer. The definition includes charges for leases and rentals of tangible personal property. Therefore, in the absence of an exemption, the lease of the carbomizers would be taxable. The taxpayer contends that the rental charges are exempt pursuant to Idaho Code §63-3622E, which states:

63-3622E. Containers.— There is exempted from the taxes imposed by this chapter the sale or purchase of containers in the following categories:

(a) Nonreturnable containers when sold without the contents to persons who place the contents in the container and sell the contents together with the container.

(b) Containers when sold with the contents if the sales price of the contents is not required to be included in the measure of the taxes imposed by this act.

(c) Returnable containers when sold with the contents in connection with a retail sale of the contents or when resold for filling.

The taxpayer argues that subsection (c) of this statute applies to the carbomizer rentals. At the hearing the taxpayer maintained that the carbomizers serve the same function as returnable cylinders, and there should not be separate treatment for them. In its protest letter the taxpayer also stated: “By definition, returnable means capable of being returned. These cylinders, by contractual obligation, are returnable....”

The Tax Commission does not dispute that the cylinders are capable of being disconnected and returned. The Commission, however, does not believe that this is the type of container to which the exemption was intended to apply when the law was enacted. The exemption was enacted as part of the original Idaho Sales Tax Act in 1965. At that time it was common for retail stores to sell soft drinks in returnable glass bottles. The exemption was meant to apply to the deposit that people paid

when purchasing soft drinks. Here it is clear that the bulk cylinders remain in place until one of the parties terminates the rental contract. The cylinders cannot, therefore, be considered “returnable” as that term is normally understood.

There is another reason why Idaho Code § 63-3622E(c) is inapplicable. The exemption only applies to sales of returnable containers when they are sold together with a retail sale of the contents. In this case the taxpayer is selling carbon dioxide to restaurants. The carbon dioxide then becomes part of the soft drinks that the restaurant sells. The taxpayer’s sale of carbon dioxide, therefore, is a sale for resale and not a retail sale, as defined by Idaho Code § 63-3609.

Actually, the different treatment for the two types of cylinders stems from the application of Idaho Code § 63-3622E(b). The exemption in that subsection applies to: “Containers when sold with the contents if the sales price of the contents is not required to be included in the measure of the taxes imposed by this act.” The returnable cylinders are sold “with the contents” and the sale of the contents, carbon dioxide, is not subject to tax. For this reason, the deposit charged for the cylinder is not taxable. For the bulk cylinders, however, the rental of the cylinder is a separate transaction from the sale of the contents. For this reason, the Carbomizers are not sold “with the contents” and the rental charge is not exempt pursuant to Idaho Code § 63-3622E.

The second issue involved an additional fee called a “hazmat” fee that was added to the sales price of certain flammable gases. The fee was added to the sales price for sales that occurred at the taxpayer’s location as well as for sales of goods that the taxpayer delivered. Since the charge is mandatory, the Commission believes that it is part of the sales price subject to tax. Idaho Code § 63-3613 states that the sales price subject to tax is the total amount paid, including services agreed to be rendered as part of the sale. Idaho sales tax rule 043.02.d (IDAPA 35.01.043.02.d) specifically states that charges required by the vendor as a condition of the sale are subject to tax. For these

reasons, the charge should be included in the amount subject to tax. A closer examination of the facts in this case, however, shows that some of the items held taxable as hazmat fees were actually delivery charges. The Commission, therefore, agrees to reduce the amount of the tax accordingly.

WHEREFORE, the Notice of Deficiency Determination dated February 27, 2004, is hereby, MODIFIED and as MODIFIED is APPROVED, AFFIRMED and MADE FINAL.

IT IS ORDERED and THIS DOES HEREBY ORDER that the petitioner pay the following tax and interest:

<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
\$74,390	\$13,352	<u>\$87,742</u>

Interest is computed through January 24, 2005.

DEMAND for immediate payment of the foregoing amount is hereby made and given.

An explanation of [Redacted]right to appeal this decision is enclosed.

DATED this _____ day of _____, 2005.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2005, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[REDACTED]

[Redacted]

[REDACTED]

Receipt No.
